No. 01-1469 (4)

Supreme Court, U.S.
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In the Supreme Court of the United States

HEARTLAND BY-PRODUCTS, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,

- AND -

UNITED STATES BEET SUGAR ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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"Discretion in the custom-house officer should be limited as strictly as possible," this Court has observed, because inconsistency in the interpretation and application of the customs laws is "the bane of commerce." *Merritt v. Welsh,* 104 U.S. (14 Otto) 694, 702 (1881). For more than a century, two basic principles of tariff classification law have cabined the discretion of the Customs Service in order to ensure "uniformity in the imposition of [customs] duties." *Worthington v. Robbins,* 139 U.S. 337, 341 (1891). The first is that "the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *Id.*; *accord United States v. Citroen*, 223 U.S. 407, 414-415 (1912). The second is that importers are entitled to fashion their goods so as to secure the most favorable duty rate. *See, e.g., Citroen*, 223 U.S. at 424; *Seeberger v. Farwell*, 139 U.S. 608, 611 (1891); *Merritt,* 104 U.S. at 702.

The Federal Circuit abandoned both of these tenets of classification law when it upheld a Customs ruling reclassifying Heartland's sugar syrup. Although Heartland's product, in its condition as imported, falls squarely within the ambit of HTSUS 1702.90.40, Customs and the Federal Circuit classified it elsewhere by treating its molasses ingredient as a "foreign substance[ ]." In derogation of the statute and this Court's precedents, Customs and the appellate court rested their classification on the pre-importation processing of Heartland's product and the product's post-importation use, and disregarded Heartland's right to fashion the product so as to enjoy favorable tariffs.

Respondents seek to evade the inescapable contradiction between the decision below and this Court's precedents. First, they offer a feeble defense of the actual grounds of the decision by the Federal Circuit. Then, they rely heavily on the argument, not accepted by the Federal Circuit, that Customs properly considered the pre-importation processing and post-importation use of Heartland's syrup to determine whether Heartland engaged in an "artifice or disguise." Next, Respondents portray this case

as one presenting only the question, addressed by this Court in *United States v. Mead Corp.*, 533 U.S. 218 (2001), of the degree of deference to be accorded to a Customs classification ruling. Finally, Respondents assert that this case has no repercussions beyond Heartland itself. These contentions are without merit, and the grounds for granting the petition are compelling.

1. Respondents tread lightly on the Federal Circuit's decision, as if fearful to fall through the gossamer foundation. The Government describes the decision as a "routine and fact-bound" application of a "narrow tariff provision," Brief in Opposition of the United States ("USOpp.") 10, 9. Yet there is nothing "routine" about a decision that contradicts more than a century of this Court's precedents, and there is scarcely any attention paid to the "narrow tariff provision" in the decision.

Both Respondents quote the Federal Circuit's rationale for disregarding as "foreign" the molasses ingredient in Heartland's sugar syrup: "When the purification of a raw product results in the production of a by-product, it is not illogical or unreasonable to conclude that the addition of that by-product to a purified or partially-purified raw product amounts to the addition of a foreign substance." Pet. App. 17a (quoted at USOpp. 16; Brief in Opposition of the United States Beet Sugar Association ("BAOpp.") 10). The "logic" of this rationale is elusive at best: egg yolks are hardly "foreign" to an omelet, even if the yolks and egg whites are separated at an earlier stage of preparation and then mixed to make the omelet. Moreover, the court's rationale collides with the fundamental principle that "the dutiable classification of articles imported must be ascertained by an examination of the imported article itself, in the condition in which it is imported." *Citroen*, 223 U.S. at 414-415.

Time and again this Court has rejected the argument that classification of an imported article could turn on the condition of the article before or after importation, or on the tariff-reduction objectives achieved by importation of the article in a particular condition. By contrast, the Federal Circuit's rationale in effect concedes that only by examining the imported article

in a pre-imported condition — indeed, only by examining one ingredient (granular sugar) of the imported article (sugar syrup) and the way in which that ingredient is originally made ("purification" that results in a molasses "by-product") — can the reclassification of Heartland's syrup be sustained. *Citroen*, which held that unstrung pearls must be classified as such, even if they were strung and then unstrung before importation, only to be restrung afterwards, bars the Federal Circuit's consideration of pre-importation processing. Furthermore, the implicit basis for the Federal Circuit's rationale — that assembly, disassembly, and reassembly of a manufactured product is somehow inappropriate — was expressly rejected by *Citroen*, and the addition of this specific "by-product" (molasses) to this specific "purified or partially-purified raw product" (granular sugar) was expressly approved in *Merritt*.[1]

The Government defends the court of appeals ruling on the grounds that the exclusion from HTSUS 1702.90.40 of "foreign substances that may have been added or developed in the product" actually "requires" the consideration of pre-importation processing. USOpp. 12. The Federal Circuit itself, however, never embraced this view, and with good reason. The issue before Customs and the courts was never whether molasses was "added" to granular sugar but whether the molasses so added

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[1] The Federal Circuit's rationale is incompatible not only with this Court's jurisprudence but also with the record. The rationale overlooks the record of expert affidavits, C.A. A0839-A0845, reference works, C.A. A0548-A0550, product specifications, C.A. A0783-A0792, and Heartland-specific evidence, C.A. A0254-A0259, all to the effect that mixing molasses with purified or partially-purified sugar is commonplace in the production of sugar products, including sugar syrups. Pet. App. 47a-49a. Moreover, it is difficult to credit the Federal Circuit's characterization of this rationale as not "unreasonable," given that the treatment of molasses as a "foreign" substance, in the specific context of HTSUS 1702.90.40, was rejected on the record by the National Import Specialist responsible for the classification of sugar products by Customs itself. *See* C.A. A0373; *see also* C.A. A0139-A0142, A0298-A0299.

was "foreign" to the sugar syrup. As the CIT concluded, this issue must be determined by consideration of the structure and terms of the tariff schedule, which focus on the ingredients of the sugar syrup and not on the process by which it is made. Pet. App. 39a-42a. The consideration of pre-importation processing by Customs, upheld by the Federal Circuit, rests on the interpolation into the tariff schedule of a reference to sugar "refining." Pet. App. 41a. This interpretation-by-interpolation is not "require[d]" by the tariff schedule; it is foreclosed by it.[2]

2. Respondents apparently realize the weakness of the Federal Circuit's decision if judged by the structure and terms of the specific tariff provision or if judged by the longstanding judicial precedents on tariff classifications. Accordingly, Respondents elide the statutory analysis, in which the CIT engaged thoroughly, Pet. App. 35a-42a. As for the case law, Respondents argue at length that Customs may depart from the two tenets of tariff classification if it suspects that an importer has "evade[d] an otherwise-applicable tariff by resorting to artifice or disguise." BAOpp. 11-12; *see id.* at 13-16; USOpp. 10-11, 14-15. That argument rests on a misstatement of this Court's precedents, a revisionist account of the undisputed evidence, and a conflation of the majority and concurring opinions below. Respondents' efforts to square the Federal Circuit decision with *Merritt*, *Worthington*, *Seeberger*, and *Citroen* are unavailing.

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[2] At bottom, both Customs and the Federal Circuit construed HTSUS 1702.90.40 as they wished it to be, not as it actually is. Remaking tariff classifications is a legislative task, however, not an administrative or judicial one. Congress could have made sugar syrups exempt from the TRQ only if they were made by a refining process, but Congress did not do so. *Compare* Pet. App. 73a *with* Pet. App. 72a (HTSUS 1703 refers expressly to product "resulting from the extraction or refining of sugar," but HTSUS 1702 does not). If HTSUS 1702.90.40 is to be reworked, the reworking must be done by the legislative branch, not "by judicial construction." *Robert G. Lynch Co. v. United States*, 49 C.C.P.A. 74, 79 (1962). *See Citroen*, 223 U.S. at 416 (where "the [tariff] statute has furnished the test [of classification,] we are not at liberty to make another").

a. The "artifice or disguise" argument advanced by Respondents is a tapestry woven without a thread of Supreme Court precedent and without a thread of record evidence. The case law confirms that a finding of artifice or disguise is an extraordinary one — so extraordinary that this Court has never found sufficient basis for such a finding. In dicta, however, the Court has indicated that, in the absence of an intentional deception by the importer, there can be no artifice or disguise and the merchandise at issue must be classified in its condition as imported. *See Citroen*, 223 U.S. at 415. "So long as no deception is practised, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred." *Merritt*, 104 U.S. at 704.[3]

In case after case, this Court has held to be lawful an importer's effort to import a product in a state that is beneficial for tariff purposes, the very same effort that Respondents attribute to Heartland and then condemn as artifice or disguise. For example, Respondents would cry "artifice or disguise" whenever there are "no commercial purposes for a process" employed by the importer. BAOpp. 13; *accord* USOpp. 13. But if that were the law, *Merritt* and *Seeberger* would have been decided differently. There was no suggestion in *Merritt* that the importer had a "commercial purpose" for adding molasses to its sugar product, other than to reduce its tariff. Indeed, the Court expressly noted that the importer sought to "avoid the burden of high duties" — an objective that the Court found to be perfectly legitimate and in no way indicative of artifice or disguise. 104 U.S. at 704. In *Seeberger*, it was undisputed that the introduc-

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[3] *Merritt* thus forecloses the Government's sweeping definition of artifice or disguise as "a carefully and delicately prepared contrivance for doing indirectly what one could not do directly." USOpp. 10 (quoting from dictum in *Savannah Sugar Refining Corp. v. United States*, 61 Treas. Dec. 401, 407, *aff'd*, 20 C.C.P.A. 272 (1932)). The Government fails to note that this formulation did not form the basis of the trial court's decision, was not adopted by the appellate court, and has never been endorsed by any court in the 70 years since.

tion of a small quantity of cotton into a woolen fabric "would not materially change the character of the goods as merchandise," 139 U.S. at 611, and made sense only to reduce tariffs. Nevertheless, the Court held that the importer was entitled to add cotton to the woolen fabric so as to take advantage of the lower duty applicable to goods "composed in part of wool." *Id.*

The Beet Association also suggests that artifice or disguise should be suspected if an imported product has "no potential uses in its current form." BAOpp. 14-15. To the contrary, this Court has repeatedly upheld the classification of articles in their condition as imported even though post-importation processing was required to make the articles useful. In *United States v. Schoverling*, 146 U.S. 76 (1892), Customs argued that an importer was importing gunstocks and barrels separately to avoid the higher duties on completed shotguns. Yet this Court held that the gunstocks were dutiable as gunstocks even though they had no practical use until, after importation, the importer assembled them with the barrels to make complete shotguns. *Id.* at 81-82. *Accord Worthington*, 139 U.S. at 338 (white hard enamel was properly classified as raw material rather than as "watch materials," despite undisputed evidence that "before [the product] can be applied to any practical use its present form and condition must be changed by grinding or pulverizing, and new processes of manufacture applied"). In sum, this Court's holdings consistently confirm that fashioning a product to achieve reduced tariffs is not an artifice or disguise, and that the product so fashioned must be classified in its condition as imported.

b. Not only do Respondents' claims of artifice or disguise contradict this Court's precedents but also they rely heavily on a remastered record that omits inconvenient facts.[4] Heartland

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[4] Respondents distort the record regarding Heartland's operations. They suggest that Heartland mixed molasses with "sugar syrup," USOpp. 9, BAOpp. 10, to increase the soluble non-sugar solids above the six percent threshold, imported the syrup, "re-remove[d] the molasses," BAOpp. 3, and then returned the same molasses to Canada for reuse in another batch. USOpp. 2-3, 6; BAOpp. 2-3. First, as a

responded truthfully to each question that Customs posed in considering Heartland's 1995 request for an advance ruling. As Heartland informed Customs, "Granular raw sugar would be combined with molasses . . . to produce a brown sugar of approximately 93 percent polarity," which would "then be dissolved in hot water" to yield a syrup of over six percent soluble non-sugar solids. C.A. A0076. The accuracy of these statements was never disputed, and Customs's own analysis of product samples confirmed their accuracy. Pet. App. 46a; Pet. 4 n.1.

Where, then, was the deception? According to Respondents, Heartland "failed to disclose the post-importation processing of the imported mixture in the United States and the intended use of the liquid sugar in the domestic market." USOpp. 3; *accord* BAOpp. 4. Respondents omit to mention that Customs *itself* considered these post-importation uses to be irrelevant in 1995 when it was considering Heartland's ruling request. *See* Pet. App. 46a; C.A. A0073. Customs was correct in considering post-importation use irrelevant: as the CIT explained, Pet. App. 46a, the regulation governing advance ruling requests requires a description of an article's chief use only if the tariff classification is a "use" provision. The subheading at issue here — HTSUS 1702.90.40 — is not one. *Id.*

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matter of record, molasses was added to granular sugar, not to sugar syrup, and molasses was not "removed" from the sugar syrup prior to importation. C.A. A0074-A0077. Second, the soluble non-sugar solids in the sugar syrup were attributable not only to the molasses but also to the granular sugar. C.A. A0793. Third, the imported product was a homogenous syrup from which molasses could not simply be extracted; a capital-intensive process was required to refine the imported sugar syrup into liquid sucrose. C.A. A0842, A0849, A0255. Finally, during the refining process in the United States, the original molasses was not "removed" from the sugar syrup. The molasses by-product contained sucrose and impurities from both the original granular sugar and the original molasses; it was not the same molasses that had been mixed with the granular sugar before importation. C.A. A0844, A0842, A0256.

Customs was *not* deceived by Heartland's 1995 ruling request. Indeed, Customs reaffirmed the 1995 ruling after a thorough investigation in the fall of 1997 that, according to the Beet Association, "uncovered the whole story." BAOpp. 4-5. After the 1997 investigation, Customs informed the Beet Association that the production, importation, and refinement of the syrup and the exportation of molasses by-product to Canada for use in making the syrup were all "perfectly legal under the [advance] ruling and the principles followed in issuing the ruling." C.A. A1659; *see also* Pet. App. 46a-47a. As Customs noted, "the principle of Customs jurisprudence here requires that goods be classified 'in their condition as imported.'" C.A. A1659; *see* C.A. A0139-A0142.

In light of that principle, Customs staff had resolved as late as August 1998 to "affirm the Heartland ruling based on the case law." C.A. A0312. Customs adhered to that view until 22 Senators jointly wrote to the Secretary of the Treasury, demanding that he "direct" Customs to revoke Heartland's advance ruling. C.A. A0351-A0353. Only when it became politically imperative to "change . . . 200 year[s] [of] precedent," C.A. A0363, did Customs resort to the artifice of "artifice or disguise." It is inconceivable that Customs would have delayed its revocation of the advance classification ruling until September 1999, after "uncover[ing] the whole story" in the fall of 1997, if Heartland's activities were truly deceptive.

c. Notably, neither of the lower courts accepted Respondents' "artifice or disguise" argument. The CIT held that the "record evidence demonstrates that [Heartland] did not engage in artifice or deceit to obtain the initial ruling under subheading 1702.90.40 HTSUS." Pet. App. 58a. The Federal Circuit majority did not disturb this CIT conclusion. Respondents make much of Judge Friedman's concurrence, USOpp. 8, 11; BAOpp. 8, 15-16, lauding it as a "persuasive application of the facts of this case to the 'artifice or disguise doctrine,'" BAOpp. 16. But the concurring opinion's factual premises are contradicted by evidence that Respondents do not dispute. Pet. 24 n.8. More-

over, the opinion's standard for artifice or disguise — whether Heartland would have added molasses to the sugar syrup *after* importation if the molasses had not been used to manufacture the sugar syrup in the first place, Pet. App. 19a — utterly contradicts the holdings of *Merritt* and its progeny. Thus, the concurrence poses no "significant vehicle problem." BAOpp. 16.

3. The Beet Association attempts to repackage this case as a "straightforward application of this Court's holding in *Mead*," BAOpp. 9, arguing that the Federal Circuit merely held that Customs's interpretation of the term "foreign substances" was entitled to deference.

But the Court need not revisit *Mead* to reach the issue presented in the petition. Although *Mead* instructs that an agency interpretation may be "eligible to claim respect according to its persuasiveness," 533 U.S. at 221, it does not cloak Customs with discretion to disregard longstanding tenets of classification law established by this Court. "[C]ourts" — not Customs officials — "are the final authorities on issues of statutory construction," *SEC v. Sloan*, 436 U.S. 103, 118 (1978) (citation and internal quotation marks omitted), and once this Court has spoken on a subject, administrative agencies and the lower courts are not free to disregard its rulings. This Court's decisions in *Merritt*, *Worthington*, *Seeberger*, *Schoverling*, and *Citroen* firmly establish the principles that goods must be classified in their condition as imported, and that importers are entitled to fashion their products to benefit from lower duty rates. It was error for Customs to interpret the term "foreign substances" in a manner inconsistent with these principles, and it was reversible error for the Federal Circuit to affirm a Customs interpretation so at odds with this Court's precedents.

4. Respondents nonetheless argue that this case is not worthy of review because it is a "narrow precedent," BAOpp. 8, which, if left undisturbed, will not "introduce broad uncertainty," USOpp. 7, nor have "untoward consequences," BAOpp. 9. In short, Respondents contend that the issues presented by the petition are of interest only to Heartland itself.

This contention belittles the two principles of classification law and their practical importance to the trade community. To protect the settled expectations of U.S. importers and their customers, the Court has directed that "certainty and impartiality in administration . . . should preeminently characterize the operation of tariff laws." *Citroen*, 223 U.S. at 424. The decision below frees Customs to choose whether to classify goods based on their condition as imported or on their condition at an earlier stage of production or on their intended use. Products identical in their condition as imported may now be subject to any number of different classifications, ensuring widespread inconsistency, controversy, and delay. A leading trade association, in urging the Federal Circuit to affirm the CIT, cited the "grave concern" of its members about the "injection of uncertainty into the operation of our tariff laws." Brief of Amicus Curiae American Association of Exporters and Importers, Aug. 1, 2000, at 11.[5]

This is precisely the consequence that this Court foresaw and precluded in insisting that articles be classified "upon an examination of the articles themselves, [not] upon extrinsic evidence obtained long afterwards." *Citroen*, 223 U.S. at 422 (internal quotations omitted). The latter approach, this Court warned, "encourages partiality, promotes injustice, and has broken down in practical application." *Id.* at 422-423. This is the fate that Heartland and all importers now face, unless this Court acts to restore its "simple and workable" requirement that products be classified in their condition as imported. *Id.* at 424.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

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[5] In its newsletter to members, AAEI noted that the "implications" of the Federal Circuit's decision extend "beyond the facts of this one industry and its disputed transactions." The decision could "lead to serious complications and uncertainties for importers and exporters, as well as their suppliers and customers." AAEI, *International Trade Alert*, Sept. 3, 2001, at 1 (12 copies lodged with Clerk of the Court).

Respectfully submitted.

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